U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: OCT 2 8 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions with an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner describes itself as a computer consulting firm. It seeks to permanently employ the beneficiary in the United States as a software market analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification. The priority date of the petition, which is the date the Department of Labor (DOL) accepted the labor certification for processing, is December 5, 2006. *See* 8 C.F.R. § 204.5(d). The DOL approved the ETA Form 9089 on June 13, 2007.

The director's decision denying the petition concludes that the petition was filed with an expired labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(b)(2) provides: "An approved permanent labor certification *granted before July 16, 2007 expires* if not filed in support of a Form I–140 petition with the Department of Homeland Security *within 180 calendar days of July 16, 2007*." (Emphasis added).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petition was filed on or about February 22, 2012 with a labor certification approved by the Department of Labor (DOL) on June 13, 2007. Approximately four and one-half years have passed after July 16, 2007 and prior to the filing of the petition with United States Citizenship and Immigration Services (USCIS). As the filing of the instant case was after 180 days of July 16, 2007, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

On appeal, counsel asserts that the original ETA Form 9089 labor certification submitted with this Form I-140, Immigrant Petition for Alien Worker should be accepted as valid because it represents a duplicate filing[2] of a Form I-140, which was filed by the petitioner on June 19, 2007 and the ETA Form 9089, Application for Permanent Labor Certification was valid at the time of the initial filing of the Form I-140 in 2007.

The record indicates that the initial Form I-140 was electronically filed on June 19, 2007. The Form I-140 was denied on August 14, 2008 because the required supporting documentation including the original, approved ETA Form 9089 was not received within the seven business days of e-filing, as set forth on the instructions for filing the petition.[3]

Although current United States Citizenship and Immigration Services (USCIS) policy provides that amended or duplicate Form I-140 petitions that are filed with copies of expired labor certifications may be accepted, this applies only when the original labor certification was submitted in support of a previously filed Form I-140 during the labor certification's validity period. As this is not the case in the instant matter, the appeal will be rejected.

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

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[2]The Form I-140 filed herein is not a duplicate, but includes a change to the original visa classification from a third preference professional to a second preference advanced degree professional.

[3] As stated by the director, the regulation at 8 C.F.R. § 103.2(b)(1) instructs the petitioner to file the petition with any required initial evidence as set forth by regulation and/or by the instructions on the form. The instructions state that the required initial evidence must be received by the Service Center within seven business days of e-filing the Form I-140.

As the labor certification is expired, the petition is not accompanied by a valid labor certification, and this office lacks jurisdiction to consider an appeal from the director's decision.

ORDER: The appeal is rejected.